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In The

Supreme Court of the United States

October Term, 1997

HUMANA, INC., AND
HUMANA HEALTH INSURANCE OF NEVADA, INC.,

Petitioners,

v.

MARY FORSYTH, MARIETTA CADE,
WILLIE ANDREWS, MARY LOU BUEHLER,
HELEN STAVES, RANDOLPH BRATTON,
AND SEARLE AUTO GLASS, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS SUGGESTING AFFIRMANCE OF THE DECISION

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INTEREST OF THE NAIC*

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association established in 1871, whose membership consists of the principal insurance regulatory officials of the 50 States, the District of Columbia, the territories and insular possessions of the United States.

In submitting this *amicus curiae* brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, as set out in its Constitution, to:

> * * * assist state insurance regulators, individually and collectively, in serving the public interest in achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:
>
> 1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
> 2. Promote the reliability, solvency, and financial solidity of insurance institutions; and
> 3. Support and improve State regulation of insurance.

All of these interests are served by the preservation of the civil Racketeer Influenced and Corrupt Organizations Act

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Amicus states pursuant to Rule 37.6 that no counsel for a party authored this brief in whole or in part and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this *amicus curiae* brief. Stipulations indicating their consent have been filed with the Clerk of the Court.

(RICO), 18 U.S.C. § 1964(c) (1994 & Supp. I 1995), as a tool available for fighting fraud by and against insurance companies.

The NAIC and its members, the principal insurance regulatory officials, resolutely believe RICO can and does enhance effective enforcement of state insurance laws and does not in any way disrupt or undermine their regulatory efforts, contrary to Petitioners' assertions.

One of the most important activities conducted by the members of the NAIC is the development and drafting of model statutes and regulations to address common national problems. These models are intended to serve as guideposts for members to assist them in presenting appropriate insurance legislation for enactment in the various state legislatures and in adopting appropriate regulations for more uniform and effective regulation of insurance in the States.

Nevada has enacted specific laws regarding "Trade Practices and Frauds" by insurers. *See* NEV. REV. STAT. Title 57 §§ 686A.010 to 686A.310 (1997). Nevada's laws are substantially derived from the NAIC's model Unfair Trade Practices Act[1], originally developed in 1947.[2] The NAIC, then, is uniquely well-suited to inform this Court concerning the purposes and intent of the statutes in

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[1] *NAIC Model Laws, Regulations and Guidelines,* Vol. IV, p. 880, 1995.

[2] Between 1947 and 1989, the model was titled The Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance. In 1989, the model's title was shortened to eliminate its long and ungainly name. *NAIC Proceedings* 1990 Vol. IA p. 146.

question and, most importantly, their interpretation and interaction with federal statutes.

Petitioners appear to believe that these Nevada insurance laws are invalidated, impaired or superseded by the application of civil RICO in contravention of the McCarran-Ferguson Act. The NAIC believes otherwise. Civil RICO serves to enhance the enforcement of Nevada's laws regarding Trade Practices and Frauds, consistent with the intent of the NAIC model act not to interfere with common law and statutory remedies available to private litigants.

The NAIC remains very active in supporting its members' ongoing battles against insurance fraud and deceptive practices of insurers. The NAIC has had for many years a standing committee on antifraud issues.[3] Committee members meet at least quarterly with representatives of the Federal Bureau of Investigation, Department of Labor, Postal Inspection Service and other

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[3] The current mission of the committee is to serve the public interest by assisting the commissioners, individually and collectively, in the following fundamental antifraud activities: 1) promotion of the public interest through the detection, monitoring and appropriate referral for investigation of insurance crime, both by and against consumers; 2) provision of assistance to the insurance regulatory community through the maintenance and improvement of electronic databases regarding fraudulent insurance activities; 3) disseminate the results of research and analysis of insurance fraud trends as well as case-specific analysis to the insurance regulatory community and state and federal law enforcement agencies; and 4) provision of the liaison function between insurance regulators, law enforcement and other specific antifraud organizations.

federal, state and international law enforcement officials to address antifraud issues relating to the insurance industry.

As recently as 1995, the committee developed an additional model, titled the Insurance Fraud Prevention Model Act[4] (Fraud Act), to further enhance existing state laws. Section 1 of the Fraud Act sets out its purpose as:

> * * * to permit full utilization of the expertise of the commissioner to investigate and discover fraudulent insurance acts more effectively, halt fraudulent insurance acts and assist and receive assistance from state, local and federal law enforcement and regulatory agencies in enforcing law prohibiting fraudulent insurance acts.

The Fraud Act urges States to create professional fraud fighting units within commissioners' offices. These units are designed to investigate and help prosecute various types of civil and criminal acts committed by insurance entities and insureds. To date, approximately 36 States have responded by establishing units, and all of them rely on federal statutes and resources to supplement their fraud fighting efforts.

But even with such aggressive measures undertaken by commissioners, not one State has attempted to totally occupy the "field" of legislation related to insurance fraud activities. In fact, many commissioners have made powerful use of civil RICO as an additional tool in their regulatory arsenal. Ever since the right of a liquidator of an insolvent insurance company to bring a civil RICO

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[4] *NAIC Model Laws, Regulations and Guidelines*, Vol. IV, p. 880, 1990.

action was recognized by a federal court of appeals in *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983), commissioners have successfully been initiating civil RICO actions against the perpetrators of insurance fraud. In fact, according to the authors of *RICO: Law, Practice, and Issues in the Context of Insurer Insolvency*:[5]

> Civil RICO is probably the single most effective deterrent that presently exists against national and international conspiracies to evade oversight by insurance regulators and to defend consumers of insurance products.[6]

The continued partnership of state and federal criminal and civil laws and remedies enacted to fight insurance fraud is of great national importance. McCarran-Ferguson permits the application of such generalized federal laws as civil RICO so long as state laws regulating the business of insurance are not "invalidated, impaired or superseded." Therefore, the NAIC urges the Court to affirm the decision of the Court of Appeals for the Ninth

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[5] Hon. James E. Long, North Carolina Insurance Commissioner and Donald M. Wright, *Journal of Insurance Regulation*, Vol. 9, No. 3, p. 344 (March 1991).

[6] *Id.* at p. 345. "Along with banking and securities, insurance is one of the most cash-intensive industries. Thus, it is a natural attraction for criminal fraud. Indeed, insurance is especially attractive for attempts at illicit fraudulent activity, because the premium is paid up front for a performance that may or may not occur. The nature of insurance transactions – involving agents, brokers, insurance carriers, reinsurers, and insureds – creates an environment where criminal activity that tends to involve many people working on a common plan of criminal activity or conspiracy can arise. This is the very type of crime that RICO was envisioned to combat – 'white collar' crime." *Id.* at p. 346.

Circuit. This is consistent with statutory law and common law and is in the best interests of insurance consumers, whom commissioners are charged by both State and Federal law to protect.

SUMMARY OF ARGUMENT

1. A plain reading of the McCarran-Ferguson Act does not indicate field pre-emption. Only federal statutes that "invalidate, impair, or supersede" state insurance laws are pre-empted. In order to determine whether civil RICO is pre-empted by the Act, courts must evaluate its effect on specific state laws regulating the business of insurance.

2. Nevada's laws regarding Trade Practices and Frauds are derived from the NAIC's model Unfair Trade Practices Act. Neither these laws or the model act were intended to create or extinguish aggrieved policyholders' private rights of action under state or federal law.

3. The job of an insurance commissioner is complex and demanding, however, state legislators have carefully chosen not to preclude private rights of action to pursue claims against insurers committing fraud and misrepresentation.

4. Congress intends the McCarran-Ferguson Act to broadly pre-empt federal statutes. The Act protects state laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance. Federal statutes that improve, aid or enhance state regulation and that do not frustrate state policy or the role of a

commissioner are not pre-empted. Civil RICO should remain a viable remedy for policyholders.

ARGUMENT

Introduction

Petitioners assert that the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), precludes a private litigant from seeking the civil remedies available under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (1994 & Supp. I 1995), where the lawsuit alleges fraudulent conduct by an insurer. Specifically, petitioners allege application of RICO "invalidates, impairs, or supersedes" state laws regulating the business of insurance where the state and federal statutory prohibitions are parallel, but the remedies provided are materially different.

The NAIC, and its members, believe strongly that the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, does not bar a federal civil RICO action by policyholders. While the NAIC believes States are entitled, pursuant to the McCarran-Ferguson Act, to enact legislation that would pre-empt civil RICO actions, neither Nevada, nor other States of which the NAIC is aware, has chosen to make its version of the NAIC's model Unfair Trade Practices Act[7]

[7] The 1989 text of the NAIC's model Unfair Trade Practices Act, which closely resembles Nevada's Trade Practices and Frauds, NEV. REV. STAT. Title 57 §§ 686A.010 to 686A.310 (1997), is reprinted in the Appendix.

the sole and exclusive remedy under state law for policyholders alleging fraud and misrepresentation by an insurer.

I. CONGRESS DID NOT INTEND THE MCCARRAN-FERGUSON ACT TO PRE-EMPT THE FIELD OF INSURANCE REGULATION. ONLY FEDERAL STATUTES THAT INVALIDATE, IMPAIR OR SUPERSEDE SPECIFIC STATE INSURANCE LAWS ARE PRE-EMPTED

Petitioners argue that Congress, by enactment of the McCarran-Ferguson Act, voluntarily "[withdrew] from a field seen best left to the states." Pet. Brief p. 9. Petitioners state the "language and history of the statute * * * intended to withdraw Congress from the field absent an express congressional statement to the contrary." Pet. Brief p. 10. "Field" pre-emption, as that term is generally understood, is inappropriate as the test for determining the application of the McCarran-Ferguson Act. There are federal statutes, however, that improve, aid and enhance the state regulatory system. Section 2(b) of the Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).[8] A plain reading of this passage does not indicate field pre-emption. As stated in *Merchants*

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[8] All parties agree that civil RICO does not "specifically relate" to the business of insurance. "Indeed, virtually every court considering this issue has held that RICO is not a federal statute exempt from the McCarran-Ferguson Act." *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 192 (3d Cir. 1997), petition for cert. filed, 67 U.S.L.W. 3024 (June 29, 1998).

Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995):

> We adopt the Seventh Circuit's well-reasoned approach. The language of § 2(b) is inconsistent with a congressional intent to allow states to pre-empt the field of insurance regulation. First, § 2(b)'s exemption of federal laws which specifically relate to the business of insurance weighs against a congressional intent wholly to abandon the field to the states. Second, only federal statutes which "invalidate, impair, or supersede" state insurance statutes are "preempted." If Congress had intended to cede the field, it could have said: "No federal statute shall be construed to *apply* to the business of insurance."

Erroneously believing field pre-emption to be the test, petitioners have vaguely put forth specific Nevada insurance laws that they allege RICO affects or displaces. Petitioners cite to §§ 686A.020, 686A.030 and 686A.040 as evidence of an intent by the Nevada legislature that RICO remedies do not apply to the conduct here. Pet. Brief p. 24. Petitioners cite § 686A.310 in footnote 4 contained within the Statement of the Facts. Pet. Brief p. 7. Since the lower district court appeared to rely on, in part, Nevada's Trade Practices and Fraud provisions, this brief will assume the Petitioners believe that civil RICO invalidates, impairs, or supersedes NEV. REV. STAT. Title 57 §§ 686A.010 to 686A.310. "In order to determine whether a cause of action under RICO would 'invalidate, impair,

or supersede' * * * insurance law, we must initially juxtapose RICO with a specific state law enacted for the purpose of regulating the insurance business." *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 192 (3d Cir. 1997), petition for cert. filed, 67 U.S.L.W. 3024 (June 29, 1998). *See also Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 421 (4th Cir. 1984) ("the presence of a general regulatory scheme" addressing insurance "does not show that any particular state law would be invalidated, impaired, or superseded.")

II. THE NAIC'S MODEL UNFAIR TRADE PRACTICES ACT AND NEVADA'S LAWS REGARDING TRADE PRACTICES AND FRAUDS DO NOT EXTINGUISH PRIVATE RIGHTS OF ACTION SUCH AS CIVIL RICO

Nevada's laws regarding Trade Practices and Frauds are substantially derived from the NAIC's model Unfair Trade Practices Act (Model Act). The Model Act was adopted by the NAIC in 1947 in direct response to passage of the McCarran-Ferguson Act. The Model Act was patterned very closely after the Federal Trade Commission Act (FTC Act) existing at that time, and only varied by enumerating certain defined acts or practices peculiar to the business of insurance. Enforcement provisions were made similar. The commissioners were given the authority to examine and investigate, conduct hearings and issue cease and desist orders, which were subject to judicial review. Even the Model Act's original penalty provisions were identical to the FTC Act.

The express purpose for effectively duplicating the FTC Act was to prevent the application of the FTC Act to the business of insurance. The "Purpose" section of the Model Act recites this fact. Because of the broad language of the FTC Act, it was necessary that state statutes should substantially cover the same ground as the FTC Act. Otherwise, a gap might result in the authority of the State which might leave these insurance practices under the jurisdiction of the FTC.[9]

In duplicating the provisions of the FTC Act, the NAIC also explicitly sought not to interfere with or disrupt existing private party causes of action, nor to create new private rights of action. In "A Report of Director Robert Ratchford, Jr., of Ohio, Regarding a Private Right of Action Under Section 4(9) [or any other section] of the NAIC Model Unfair Trade Practices Act," *NAIC Proceedings* 1980, Vol. II. p. 344 at 350, it states:

> * * * the intent of the NAIC, as evidenced in the language of the Model and the *NAIC Proceedings*, and supplemented by this Report, was clearly not to create a new private right of action for trade practices which are prohibited by the Model Act. *Any such practices which may be actionable under other law are not restricted by the Model.*[10] (emphasis added).

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[9] *NAIC Proceedings* 1959, Vol. I. p. 145-147.

[10] *See, NAIC Proceedings* 1980, Vol. II. p. 344 at 345. The Report also stated: "The FTC Act, and orders issued under it, has been held by the U.S. Supreme Court as not 'intended to impose criminal punishment or exact compensatory damages for past acts but to prevent illegal practices in the future.' *FTC v. Ruberoid Co.*, 78 S. Ct. 800 at p. 803 (1952). I know of no case in

As further evidence that the Model Act was never intended to create or extinguish private rights of action, in the early 1970s, the NAIC considered amendments to the Model Act to expand commissioners' remedial options and to address unfair insurance claims settlement practices. One proposal would have allowed commissioners to bring class actions on behalf of injured consumers for relief from unfair practices. Another would have expanded the remedies available to commissioners, once an unfair practice had been demonstrated, and to include orders directing the guilty party to make restitution to those injured by its practices. On November 29, 1971, an Industry Advisory Committee successfully argued against the inclusion of so-called "restitution" provisions in any revisions to the Model Act contending that such remedies were unnecessary because "persons injured have an adequate remedy at law," and that it was inappropriate to have the commissioner assume "a role that is usually the province of a jury – that is, ascertain who may have been harmed and by what extent." *NAIC Proceedings* 1972, Vol. I. p. 490 at 509.[11]

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which the courts have held that the FTC Act itself creates a private right of action in the person alleged to be injured as a result of the commission of the unfair act or practice. Given that the 1947 Model Act was specifically designed to foreclose the application of the FTC Act to insurance practices; and that the Model so closely parallels the FTC Act; and that in the absence of any evidence to the contrary, *we must conclude that the 1947 Model act was never intended to go beyond the FTC Act and did not itself create any private right of action.*" (emphasis added).

[11] Over the years, many state legislatures have provided commissioners with the power to compel restitution for aggrieved policyholders; however, the NAIC is unaware of any

The petitioners' argument, that Nevada's Trade Practices and Fraud statutes are such a comprehensive regulatory scheme that they would supersede private party remedies is flatly contradicted by both the text and the legislative history of those statutes. Nothing in the debates surrounding the Model Act in 1947, 1959, 1971, 1990, or since, suggest that the drafters meant to foreclose enforcement of *any* private remedies for insurer fraud or misrepresentation, whether state or federal.

Case law in Nevada supports the conclusion that its laws regarding Trade Practices and Frauds were not intended to invalidate, impair or supersede any private remedies, except to enhance or complement them. The seminal case in Nevada recognizing a common-law remedy for bad faith against an insurer is *United States Fidelity & Guaranty Co. v. Peterson*, 540 P.2d 1070 (1975). In that case, the Nevada Supreme Court first recognized the existence of a cause of action for an insurer's tortious breach of the implied covenant of good faith and fair dealing. *Peterson* involved a claim made by the insurer's own insured, i.e., a "first party" claim. The court found that an insurer engaged in bad faith where it acted unreasonably by refusing to pay monies validly due under an

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states that preclude additional private remedies to policyholders. *See also NAIC Proceedings* 1971, Vol. II. p. 344 at 350. On June 16, 1971, the Industry Advisory Committee provided a similar report that "strongly recommends against the inclusion in the Model Act of any provision for consumer class action suits for damages resulting from violation of the Act * * * *[because] the common law in all states recognize the principle of representative actions, so the consumer is not without remedy in this area.*" (emphasis added).

insurance contract, where the insurer was aware of the precarious financial condition of the insured. In *Peterson*, the court never mentions the Nevada Trade Practices and Frauds laws, and explicitly states that the duty is one "imposed by law." *Id.* at 1071.

In 1987, the Nevada legislature amended § 686A.310 to include, for the first time, a private right of action:

> 2. In addition to any rights or remedies available to the commissioner, an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

In *Hart v. Prudential Prop. & Cas. Ins. Co.*, 848 F.Supp. 900 (D.Nev. 1994), the court described the inter-relationship between the common law tort of bad faith as recognized in *Peterson, supra*, and Nevada's laws regarding Trade Practices and Frauds, and in particular, the new private right of action in § 686A.310(2). In doing so, the court held that it was not the intent of the Nevada legislature in enacting the §§ 686A.010 to 686A.310 to codify the common bad faith tort. Rather, § 686A.310(2) is intended as an additional remedy at law available to aggrieved first party insureds. *Id.* at 900.

III. CIVIL RICO IMPROVES, AIDS, COMPLEMENTS AND ENHANCES STATE REGULATION OF THE BUSINESS OF INSURANCE AND IS USED BY COMMISSIONERS TO FIGHT FRAUD

The job of an insurance commissioner is complex. Operating primarily in an administrative law setting, a commissioner's duties commonly include ensuring the

solvency of insurance companies doing business in the state, licensing of those companies and their agents and brokers, review and approval of rates and policy forms, performing financial and market conduct examinations, overseeing insurance company restructuring activities, liquidations and receiverships, among other activities. Each commissioner is also responsible for enforcement actions against illegal or unethical conduct of certain entities for a variety of proscribed statutory and regulatory behavior.

It is within the context of these heavy responsibilities that the drafters of the NAIC's model Unfair Trade Practices Act and the state legislators who enacted substantially similar state laws, have carefully avoided placing the commissioner in the role of protector and pursuer of the private rights of action of those injured by insurance-related frauds and misrepresentations. To the contrary, where retrospective remedies for private victims of insurance fraud are concerned, state legislatures have left the responsibility of seeking advantage of existing state, or here, federal, remedies to the victim. It would not be realistic to expect insurance commissioners to settle every dispute among policyholders, insurers, brokers, agents, intermediaries, reinsurers, and the like, and it would make no economic or common sense to try to reinvent the whole structure of contractual and tort remedies in the guise of insurance regulation.[12]

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[12] For a complete review of existing policyholder private rights of action, *see* "Liability of Insurer for Penalties and Attorney's Fees," *Couch on Insurance* 2d (Rev. ed.) § 58.

In RICO, Congress created a whole new vehicle for pursuing recompense for certain serious frauds, including certain frauds perpetrated in connection with insurance activities. And, it is an appealing vehicle with its provisions for treble damages, attorneys' fees to prevailing parties, interstate service of summons, and its generous statute of limitations. In the over 28 years since RICO was enacted, not a single commissioner has complained that RICO was interfering with the enforcement of any state insurance law. To the contrary, certain commissioners gave Congressional testimony against efforts to weaken RICO,[13] and the NAIC filed an *amicus* brief urging a broad construction of the "participation" element of a RICO violation in the Supreme Court appeal of *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993). In addition, commissioners have themselves successfully used RICO where, by operation of their responsibilities under insurance liquidation codes, they are required to pursue private actions on behalf of insolvent insurance companies that were defrauded by those who operated them.

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[13] The testimony was given in 1989 in connection with S. 438 and in 1991 in connection with H.R. 1717. Neither bill passed.

IV. THE MCCARRAN-FERGUSON ACT BROADLY PRE-EMPTS FEDERAL STATUTES SO AS TO PROTECT STATES' RIGHT TO REGULATE THE BUSINESS OF INSURANCE. CIVIL RICO IS NOT PRE-EMPTED BECAUSE IT IMPROVES, AIDS AND ENHANCES THE STATE REGULATORY SYSTEM

In passing the McCarran-Ferguson Act, Congress intended to give *broad* support to existing and future state systems for regulating the business of insurance. As this Court stated in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-430 (1946):

> This was done * * * by removing obstructions which might be thought to flow from its own power, whether dormant or exercised * * * [and] by declaring expressly and affirmatively that continued state regulation * * * is in the public interest. * * * its purpose was evidently to throw the whole weight of its power behind the state systems * * * .

This broad support for McCarran-Ferguson pre-emption was again stated in the Court's pronouncement in *U.S. Dept. of the Treasury v. Fabe*, 508 U.S. 491, 505-507 (1993):

> The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. * * * This category necessarily encompasses more than just the "business of insurance." * * * The McCarran-Ferguson Act did not simply overrule *South-Eastern Underwriters* and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of

> pre-emption. * * * The first clause of § 2(b) * * * imposes what is, in effect, a clear-statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to *conflicting* federal statutes unless a federal statute specifically requires otherwise. (emphasis added.)

McCarran-Ferguson requires that the test for this "conflict" is when a federal statute "invalidates, impairs, or supersedes" a state law regulating the business of insurance. When one attempts to simplify the many dictionary meanings for such terms (e.g., to weaken, to destroy the authority of, to make worse, to deteriorate, to force out as inferior, to replace) one is left with a resounding conclusion – federal statutes that improve, aid or enhance the regulatory system that state legislatures have enacted are not pre-empted. Federal statutes that do not frustrate state policy, or the role of a commissioner under that policy, are not pre-empted.

Cases such as *Silkwood*[14] and *ARC America*[15] decided that state and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other. Nothing in this conclusion permits federal law to displace States' choices about the proper conduct of the business of insurance. *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

Unless and until a State chooses to design laws or remedies for aggrieved policyholders that would be

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[14] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

[15] *California v. ARC America Corp.*, 490 U.S. 93 (1989).

harmed or adversely affected directly or indirectly, civil RICO should remain a viable option in their arsenal of existing administrative and judicial remedies available under the law.

CONCLUSION

For all these reasons, the NAIC respectfully urges that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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UNFAIR TRADE PRACTICES ACT

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Section 1. Declaration of Purpose.

The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Section 2. Definitions.

When used in this Act:

A. "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, consultants and adjusters. Person shall also mean medical service plans and hospital service plans as defined in Section [insert applicable section]. For purposes of this Act, medical and hospital service plans shall be deemed to be engaged in the business of insurance.

Drafting Note: Consultant is defined in the Agents and Brokers Licensing Model Act, Page 210-2, as follows:

Section 2. Definitions

E. Consultant. A consultant is an individual, partnership or corporation, who, for a fee, holds himself or itself out to the public as engaged in the business of offering any advice, counsel, opinion or service with

respect to the benefits, advantages or disadvantages promised under any policy of insurance that could be issued in this State.

Each state should examine its laws respecting insurance consultants or financial planners to determine if this section conflicts with existing laws.

Drafting Note: This definition could also include dental, optometric and other service plans The enabling statutes of all service plans should also be amended to make them subject to this Act.

B. "Commissioner" shall mean the Commissioner of Insurance of this state.

C. "Insurance policy" or "insurance contract" shall mean any contact of insurance, indemnity, medical or hospital service, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any person.

Drafting Note: Each state may wish to consider the advisability of defining "insurance" for purposes of this Act if its present insurance code is not satisfactory in this regard. In some cases a cross reference will be sufficient. "Service contract" is intended to cover the product issued by medical and hospital service plans and should be changed to conform to the laws of each state.

Section 3. Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Prohibited.

No person shall engage in this state in any trade practice which is defined in this Act as, or determined pursuant to Section 7 of this Act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

Section 4. Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

A. Misrepresentations and False Advertising of Insurance Policies. Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustrations, circular or statement, sales presentation, omission, or comparison which:

(1) Misrepresents the benefits, advantages, conditions or terms of any insurance policy; or

(2) Misrepresents the dividends or share of the surplus to be received on any insurance policy; or

(3) Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy; or

(4) Is misleading or is a misrepresentation as to the financial condition of any person, or as to the legal reserve system upon which any life insurer operates; or

(5) Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof; or

(6) Is a misrepresentation for the purpose of inducing or tending to induce to the lapse, forfeiture, exchange, conversion or surrender of any insurance policy; or

(7) Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy; or

(8) Misrepresents any insurance policy as being shares of stock.

B. False Information and Advertising Generally. Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

C. Defamation. Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any person, and which is calculated to injure such person.

D. Boycott, Coercion and Intimidation. Entering into any agreement to commit, or by any concerted action committing any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

E. False Statements and Entries.

(1) Knowingly filing with any supervisory or other public official, or knowingly making, publishing, disseminating, circulating or delivering

to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of a person.

(2) Knowingly making any false entry of a material fact in any book, report or statement of any person or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report or statement of such person.

F. Stock Operations and Advisory Board Contracts. Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

G. Unfair Discrimination.

(1) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(2) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder,

or in any of the terms or conditions of such contract, or in any other manner whatever.

Drafting Note: In the event that unfair discrimination in connection with accident and health coverage is treated in other statutes, this paragraph should be omitted.

(3) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, canceling or limiting the amount of insurance coverage on a property or casualty risk because of the geographic location of the risk, unless:

(a) The refusal, cancellation or limitation is for a business purpose which is not a mere pretext for unfair discrimination, or

(b) The refusal, cancellation or limitation is required by law or regulatory mandate.

(4) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, cancelling or limiting the amount of insurance coverage on a residential property risk, or the personal property contained therein, because of the age of the residential property, unless:

(a) The refusal, cancellation or limitation is for a business purpose which is not a mere pretext for unfair discrimination, or

(b) The refusal, cancellation or limitation is required by law or regulatory mandate.

(5) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the sex or marital status of the individual; however, nothing in

this subsection shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependent benefits.

(6) To terminate, or to modify coverage or to refuse to issue or refuse to renew any property or casualty policy or contract of insurance solely because the applicant or insured or any employee of either is either mentally or physically impaired; provided that this subsection shall not apply to accident and health insurance sold by a casualty insurer and, provided further, that this subsection shall not be interpreted to modify any other provision of law relating to the termination, modification, issuance or renewal of any insurance policy or contract.

H. Rebates.

(1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity, or accident and health insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance contract or annuity or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association

or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

(2) Nothing in Subsection G, or Paragraph (1) of Subsection H shall be construed as including within the definition of discrimination or rebates any of the following practices:

(a) In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;

(b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an, office of the insurer in an amount which fairly represents the saving in collection expenses;

(c) Readjustment of the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

Drafting Note: Each state may wish to examine its rating laws to assure that they contain sufficient provision against rebating. If they do not, this section might be expanded to cover all lines of insurance.

I. Unfair Claim Settlement Practices. Committing or performing with such frequency as to indicate a general business practice any of the following:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(9) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(10) Making claims payments to the insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments an being made;

(11) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(12) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(13) Failing to promptly settle claims, when liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

(14) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

J. Failure to Maintain Complaint Handling Procedures. Failure of any person to maintain a complete record of all the complaints which it has received since the date of its last examination under Section [insert applicable section].

This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, and the time it took to process each complaint. For purposes of this subsection, "complaint" shall mean any written communication primarily expressing a grievance.

Drafting Note: Each state may wish to consider exempting agents and brokers from this subsection.

K. Misrepresentation in Insurance Applications. Making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money or other benefit from any insurers, agent, broker or individual.

L. Unfair Financial Planning Practices. An insurance agent, broker or consultant:

(1) Holding himself out, directly or indirectly, to the public as a "financial planner," "investment adviser," "consultant," "financial counselor," or any other specialist engaged in the business of giving financial planning or advice relating to investments, insurance, real estate, tax matters, or trust and estate matters when such person is in fact engaged only in the sale of insurance contracts.

This provision is not intended to preclude persons who hold some form of formal recognized financial planning or consultant designation from using this designation when they are only selling insurance. This does not permit individuals to charge an additional fee for services which are customarily associated with the solicitation, negotiation or servicing of an insurance contract.

(2)(a) Engaging in the business of financial planning without disclosing to the client prior to the execution of the agreement provided for in Paragraph 3, or solicitation of the sale of a product or service that

(i) He is also an insurance salesperson, and

(ii) That a commission for the sale of an insurance product will be received in addition to a fee for financial planning, if such is the case.

(b) The disclosure requirement under this subsection may be met by including it in any disclosure required by federal or state securities law,

(3)(a) Charging fees other than commissions for financial planning by insurance agents, brokers or consultants, unless such fees are based upon a written agreement, which is signed by the party to be charged in advance of the performance of the services under the agreement. A copy of the agreement must be provided to the party to be charged at the time the agreement is signed by the party.

(i) The services for which the fee is to be charged must be specifically stated in the agreement.

(ii) The amount of the fee to be charged or how it will be determined or calculated must be specifically stated in the agreement.

(iii) The agreement must state that the client is under no obligation to purchase any insurance product through the insurance agent, broker or consultant.

Drafting Note: This subsection is intended to apply only to persons engaged in personal financial planning.

(b) The insurance agent, broker or consultant must retain a copy of the agreement for not less than three (3) years after completion of services, and a copy shall be available to the Commissioner upon request.

M. Any violation of any one of Sections [insert applicable sections].

Drafting Note: Insert section numbers of any other sections of the insurance law which it is deemed desirable or necessary to include as an unfair trade practice.

Section 5. Favored Agent or Insurer; Coercion of Debtors.

A. No person may require as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligation a creditor is to acquire or finance, negotiate any contract of insurance or renewal thereof through a particular insurer or group of insurers or agent or broker or group of agents or brokers.

B. No person who lends money or extends credit may:

(1) Solicit insurance for the protection of real property, after a person indicates interest in securing a first mortgage credit extension, until

such person has received a commitment in writing from the lender as to a loan or credit extension;

(2) Unreasonably reject a contract of insurance furnished by the borrower for the protection of the property securing the credit or lien. A rejection shall not be deemed unreasonable if it is based on reasonable standards, uniformly applied, relating to the extent of coverage required and the financial soundness and the services of an insurer. Such standards shall not discriminate against any particular type of insurer, not shall such standards call for rejection of an insurance contract because the contract contains coverage in addition to that required in the credit transaction;

(3) Require that any borrower, mortgagor, purchaser, insurer, broker, or agent pay a separate charge, in connection with the handling of any contract of insurance required as security for a loan on real estate, or pay a separate charge to substitute the insurance policy of one insurer for that of another. This paragraph does not include the interest which may be charged on premium loans or premium advancements in accordance with the terms of the loan or credit document;

(4) Use or disclose, without the prior written consent of the borrower, mortgagor or purchaser taken at a time other than the making of the loan or extension of credit, information relative to a contract of insurance which is required by the credit transaction, for the purpose of replacing such insurance;

(5) Require any procedures or conditions of duly licensed agents, brokers, or insurers not customarily required of those agents, brokers or

insurers affiliated or in any way connected with the person who lends money or extends credit.

C. Every person who lends money or extends credit and who solicits insurance on real and personal property subject to Subsection B of this section must explain to the borrower in writing that the insurance related to such credit extension may be purchased from an insurer or agent of the borrower's choice, subject only to the lender's right to reject a given insurer or agent as provided in Subsection B(2). Compliance with disclosures as to insurance required by Truth-In-Lending laws or comparable state laws shall be in compliance with this subsection.

This requirement for a commitment shall not apply in cases where the premium for the required insurance is to be financed as part of the loan or extension of credit involving personal property transactions.

D. The Commissioner shall have the power to examine and investigate those insurance related activities of any person which the Commissioner believes may be in violation of this section. Any affected person may submit to the Commissioner a complaint or material pertinent to the enforcement of this section.

E. Nothing herein shall prevent a person who lends money or extends credit from placing insurance on real or personal property in the event the mortgagor, borrower or purchaser has failed to provide required insurance in accordance with the terms of the loan or credit document.

F. Nothing contained in this section shall apply to credit life or credit accident and health insurance.

G. For purposes of this section, "person" includes any individual, corporation, association, partnership or other legal entity.

Section 6. Power of Commissioner.

The Commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by Section 3 of this Act.

Section 7. Defined and Undefined Practices: Hearings, Witnesses, Appearances, Production of Books, and Service of Process.

A. Whenever the Commissioner shall have reason to believe that any person, as defined in Section 2A or Section 5G, has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice whether or not defined in Section 4 or 5, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than [insert number] days after the date of the service thereof.

B. At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the Commissioner requiring such person to cease and desist from the

acts, methods or practices so complained of. Upon good cause shown, the Commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

C. Nothing contained in this Act shall require the observance at any such hearing of formal rules of pleading or evidence.

D. The Commissioner, upon such hearing, may administer oaths, examine and cross examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The Commissioner, upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the Commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the [insert title] Court of [insert county] County or the county where such party resides, on application of the Commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

E. Statements of charges, notices, orders, and other processes of the Commissioner under this Act may be served

by anyone duly authorized by the Commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return, by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return, postcard receipt for such statement, notice, order or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

Section 8. Cease and Desist and Penalty Orders and Modifications Thereof.

A. If, after such hearing, the Commissioner shall determine that the person charged has engaged in an unfair method of competition or an unfair or deceptive act or practice, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation a copy of such findings and an order requiring such person to cease and desist from engaging in such method of competition, act or practice and if the act or practice is a violation of Sections 4 or 5, the Commissioner may at his discretion order any one or more of the following:

(1) Payment of a monetary penalty of not more than $1,000 for each and every act or violation but not to exceed an aggregate penalty of $10,000 unless the person knew or reasonably should have known he was in violation of this Act, in which case the penalty shall be not more

than $5,000 for each and every act or violation but not to exceed an aggregate penalty of $50,000 in any six-month period.

(2) Suspension or revocation of the person's license if he knew or reasonably should have known he was in violation of this Act.

B. Until the expiration of the time allowed under Section 9 of this Act for filing a petition for review (by appeal or writ of certiorari) if no such petition has been duly filed within such time or, if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the [insert title] Court, as hereinafter provided, the Commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

C. After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the Commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

Section 9. Judicial Review of Orders.

A. Any person subject to an order of the Commissioner under Section 8 or Section 11 may obtain a review of such order by filing in the [insert title] Court of [insert county] County, within [insert number] days from the date of the

service of such order, a written petition praying that the order of the Commissioner be set aside. A copy of such petition shall be forthwith served upon the Commissioner, and thereupon the Commissioner forthwith shall certify and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commissioner. Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the Commissioner, and shall have power to make and enter upon the pleadings, evidence and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the Commissioner, in whole or in part. The findings of the Commissioner as to the facts, if supported by [insert type] evidence, shall be conclusive.

Drafting Note: Insert appropriate language to accommodate to local procedure the effect given the Commissioner's determination.

B. To the extent that the order of the Commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commissioner, the court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which is supported by [insert type] evidence shall be conclusive, and his recommendation if any, for the modification or setting aside of his original order, with the return of such additional evidence.

Drafting Note: Insert appropriate language to accommodate to local procedure the effect given the Commissioner's determination. In a state where final judgment, order or decree would not be subject to review by an appellate court provision therefor should be here inserted.

C. An order issued by the Commissioner under Section 8 shall become final:

(1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the Commissioner may thereafter modify or set aside his order to the extent provided in Section 8B; or

(2) Upon the final decision of the court if the court directs that the order of the Commissioner be affirmed or the petition for review dismissed.

D. No order of the Commissioner under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

Section 10. Judicial Review by Intervenor.

If after any hearing under Section 7 or Section 11, the report of the Commissioner does not charge a violation of

this Act, then any intervenor in the proceedings may within [insert number] days after the service of such report, cause a petition [notice of appeal] [petition for writ of certiorari] to be filed in the [insert title] Court of [insert county] County for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the Commissioner, constitutes a violation of this Act, and containing penalties pursuant to Section 8.

Drafting Note: The type of procedure should conform to state procedure. See also note to Section 9 concerning review of appellate courts.

Section 11. Penalty for Violation of Cease and Desist Orders.

Any person who violates a cease and desist order of the Commissioner under Section 8 and while such order is in effect may after notice and hearing and upon order of the Commissioner be subject at the discretion of the Commissioner to any one or more of the following:

A. A monetary penalty of not more than $10,000 for each and every act or violation; or

B. Suspension or revocation of such person's license.

Section 12. Regulations.

The Commissioner may, after notice and hearing, promulgate reasonable rules and regulations, as are necessary or proper to identify specific methods of competition or acts or practices which are prohibited by Sections 4 or 5, but the regulations shall not enlarge upon or extend the provisions of Sections 4 and 5. Such regulations shall be subject to review in accordance with Section [insert applicable section].

Drafting Note: Insert section number providing for review of administrative orders.

Section 13. Provisions of Act Additional to Existing Law.

The powers vested in the Commissioner by this Act, shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

Section 14. Immunity From Prosecution.

If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must none the less comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or

forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the Insurance Law of this state. Any such individual may execute, acknowledge and file in the office of the Commissioner a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced.

Section 15. Separability Provision.

If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to person or circumstances other than

those as to which it is held invalid, shall not be affected thereby.

Legislative History (all references are to the proceedings of the NAIC).

1947 Proc. 383, 392-400, 413 (adopted).
1960 Proc. II 485-487, 509-515, 516 (reprinted).
1972 Proc. I 15, 16, 443-444, 491, 493-501 (amended and reprinted).
1977 Proc. I 26, 28, 211, 226-227 (amended).
1979 Proc. II 31, 34, 38, 39, 525 (amended).
1985 Proc. I 19, 39, 85-86 (amended).
1989 Proc. II 13, 21, 129-130, 132, 133-140 (amended and reprinted).